IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RIGOBERTO URREA SANCHEZ, Appellant.	No. 31704-4-II UNPUBLISHED OPINION

BRIDGEWATER, J. — Rigoberto Urrea Sanchez appeals his convictions for unlawful delivery of methamphetamine under former RCW 69.50.401 (2002). We affirm.

FACTS

In October 2002, the State arrested Salvador Navarro for possession and delivery of a controlled substance. To avoid incarceration, Navarro agreed to act as a confidential informant for law enforcement. The police asked Navarro to target Rigoberto Sanchez, the owner of a bar in downtown Centralia. Thereafter, Sanchez introduced Navarro to Saul Martinez for the purpose of purchasing methamphetamine. Martinez made several deliveries to Navarro.

Based on this and other information, the police obtained a search warrant for Sanchez's residence. During the search, the police discovered two firearms, but they did not discover any controlled substances or related paraphernalia. The police then drove to the bar in downtown Centralia and arrested Sanchez for conspiracy to deliver methamphetamine. After the police read

him his *Miranda*[1] rights, and explained that they had searched his house and arrested his wife, Sanchez consented to a search of his bar. Sanchez directed the police to a firearm kept at the bar.

The State charged Sanchez with three counts of delivery of methamphetamine. The State also charged Sanchez with three counts of second degree unlawful possession of a firearm.

Before trial, Sanchez moved to suppress evidence of the firearms obtained from his residence and bar. The State conceded that the police executed an unlawful search of the residence, and the State agreed to dismiss the two charges associated with the firearms obtained from Sanchez's residence. But the trial court ruled that the evidence of the firearm obtained from the bar would be admissible, as Sanchez had consented to the search of his business.

To prove the identity of the delivered substances for counts II and III,[2] the State called Tina Wu, a forensic drug chemist with the Drug Enforcement Administration, to testify at trial. She identified the delivered substances as "d-methamphetamine hydrochloride and dimethyl sulfone," but she also referred to them as "methamphetamine." Ex. 12, Report of Proceedings (RP) (Nov. 19, 2003) at 119, 120, 121, 126, 127, 129, 130, and 132-33.

After the State rested, the trial court dismissed the last count of second degree unlawful possession of a firearm for insufficient evidence. The trial court did not give the jury the exhibits relating to the firearm and Sanchez's prior drug conviction; the trial court did not instruct the jury to disregard the prior drug conviction; and Sanchez's counsel did not move to strike the evidence

[1] *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Sanchez does not raise any issue regarding the identity of the substance in count I; thus, our discussion concerns only whether the evidence was sufficient to prove delivery of methamphetamine in counts II and III.

or request a limiting instruction, although the trial court offered to give a limiting instruction, which Sanchez's counsel declined.

The jury convicted Sanchez of three counts of unlawful delivery of a controlled substance. Following the trial, Sanchez moved for arrest of judgment and for a new trial. The trial court denied the motion. The trial court sentenced Sanchez to five years in prison.

I. Sufficiency of the Evidence

Sanchez argues that the State failed to present sufficient evidence to prove that he delivered methamphetamine. His argument fails.

We review the sufficiency of evidence to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When a defendant challenges the sufficiency of evidence in a criminal case, we draw all reasonable inferences from the evidence in favor of the State and most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75 (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

Among other things, the State charged Sanchez with three counts of unlawful delivery of a controlled substance, "to wit: Methamphetamine," in violation of former RCW 69.50.401(a)

(2002), *amended by* Laws of 2003, ch. 53, § 331.[3] Clerk's Papers (CP) at 167-69.

Former RCW 69.50.401 provided in relevant part:

> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> (1) Any person who violates this subsection with respect to:
>
> . . . .
>
> (ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years . . . .
>
> (iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years.

Based on the evidence presented at trial, Sanchez concedes that the State proved delivery of *methamphetamine hydrochloride*. But he argues that the State did not prove delivery of *methamphetamine*, the charged crime.[4] We do not agree.

First, drawing all reasonable inferences from the evidence in favor of the State and most strongly against the defendant, we hold that sufficient evidence supports Sanchez's convictions. While Wu identified, and routinely referred to, the delivered substances from March 6, 2003, and April 10, 2003 (the substances charged in counts II and III), as "d-methamphetamine hydrochloride and dimethyl sulfone," she also referred to the delivered substances as "*d-methamphetamine* and dimethyl sulfone." Ex. 12, RP (Nov. 19, 2003) at 119, 120, 121, 126, 127, 129, 130, and 132-33 (emphasis added). In response to a question from the State about whether d-methamphetamine was "another word for" methamphetamine, Wu answered, "It's a

[3] The amendments took effect July 1, 2004. *See* notes following RCW 2.48.180.

[4] Thus, Sanchez seeks to have his convictions reversed and his case dismissed with prejudice.

more specific word for the type of *methamphetamine* that is in [the exhibits]." RP (Nov. 19, 2003) at 122 (emphasis added). And, in response to a question from the State about whether methamphetamine was in the exhibits, Wu answered, "Yes, there is." RP (Nov. 19, 2003) at 122.[5]

Second, we note that in *State v. Cromwell*, No. 77356-4, 2006 Wash. LEXIS 610, at *12 (Aug. 10, 2006), our Supreme Court recently held that "methamphetamine as referenced in former RCW 69.50.401(a)(1)(ii) plainly means all forms of the substance." Thus, methamphetamine base (the liquid) and methamphetamine hydrochloride (the salt) are the same chemical substance. *Cromwell*, 2006 Wash. LEXIS 610, at *10.[6]

Accordingly, we do not reverse Sanchez's convictions.

II. The Law of the Case

Sanchez argues that the jury instructions required the State to prove, not only that he knew the delivered substances were a controlled substance, but also that he knew the delivered substances were methamphetamine.

Sanchez cites to *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998), for the proposition that under the law of the case doctrine, jury instructions not objected to become the law of the case. "In criminal cases, the State assumes the burden of proving otherwise

[5] A Washington State Patrol Crime Laboratory Report found that the delivered substances pertaining to count I "revealed the presence of METHAMPHETAMINE." Ex. 28.

[6] Because the prohibition in former RCW 69.50.401(a)(1)(ii) covers both methamphetamine and methamphetamine hydrochloride, this case is unlike *State v. Evans*, 129 Wn. App. 211, 118 P.3d 419 (2005), *review denied*, 157 Wn.2d 1001 (2006), where the trial court invaded the province of the jury when it, and not the jury, identified the particular substance underlying the convictions.

unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *Hickman*, 135 Wn.2d at 102 (citations omitted). And, on appeal, a defendant may include a challenge to the sufficiency of evidence of the added element. *Hickman*, 135 Wn.2d at 102-03.

The trial court instructed the jury that it could convict the defendant if it found: "(1) That on or about [the alleged date], the defendant delivered a controlled substance; (2) That the defendant knew that the substance delivered was a controlled substance, methamphetamine; and (3) That the acts occurred in the State of Washington." CP at 151.

Because the State allegedly did not prove that Sanchez knew he was delivering methamphetamine, he argues that the conviction must be reversed and the case dismissed for insufficient evidence.

Yet, in *State v. Nunez-Martinez*, 90 Wn. App. 250, 255-56, 951 P.2d 823 (1998), we held that the State did not have to allege or prove that the defendant knew he was delivering amphetamine. In *Nunez-Martinez*, the trial court instructed the jury that it could convict the defendant if it found: "(1) That on or about [the alleged date], the defendant delivered a controlled substance, to wit: amphetamine; (2) That the defendant knew it was a controlled substance; and (3) That the acts occurred in the State of Washington." *Nunez-Martinez*, 90 Wn. App. at 253.

We stated:

> In our view, the guilty knowledge required . . . is knowledge that the substance being delivered is a controlled substance. It is not knowledge of the substance's exact chemical or street name. As noted by the Wisconsin Supreme Court, there would seem to be little public purpose in "insulating from criminal liability those defendants who knowingly deal in prohibited controlled substances,

> but are ignorant, mistaken, or willing to misrepresent the exact nature or chemical name of the substance which they traffic." [*State v. Sartin*, 200 Wis. 2d 47, 546 N.W. 2d 449, 456 (1996).]

Nunez-Martinez, 90 Wn. App. at 254. Thus, the State had to allege and prove only that the defendant knew he was delivering a controlled substance. *Nunez-Martinez*, 90 Wn. App. at 255-56.[7] Here, we follow *Nunez-Martinez* and hold that the State had to allege and prove only that Sanchez knew he was delivering a controlled substance.

In any event, there is substantial evidence that Sanchez knew that the delivered substances were methamphetamine. At trial Navarro testified, "I told [Sanchez] that I was trying to purchase a pound of methamphetamine. I asked him if he knew somebody that would help me out." RP (Nov. 17, 2003) at 42. According to Navarro, "[Sanchez] said he knew a guy. He might be able to help us out." RP (Nov. 17, 2003) at 42.

Navarro also testified that during conversations between December 2002 and January 2003, he asked Sanchez "to help me to get a pound of methamphetamine." RP (Nov. 17, 2003) at 58. Again, Navarro claimed, "[Sanchez] told me he knew this guy. He had stuff and he will help me out." RP (Nov. 17, 2003) at 58. After a failed attempt at a drug deal, Navarro called Sanchez, who facilitated yet another drug deal. According to Navarro, Sanchez called Martinez to arrange this meeting. When Navarro paid Sanchez for arranging one of the drug deals,

[7] Our Supreme Court has passed on this question, stating, "We need not speculate . . . whether the State must prove beyond a reasonable doubt that the *defendant* knew the specific identity of the controlled substance." *State v. Goodman*, 150 Wn.2d 774, 786-87, 83 P.3d 410 (2004); *see also State v. DeVries*, 149 Wn.2d 842, 850 n.4, 72 P.3d 748 (2003). In any case, the court stated, "This result [in *Nunez-Martinez*] stems from the statutory ambiguity of whether the defendant must know the specific identity of the controlled substance in order to be convicted under RCW 69.50.401(a)." *Goodman*, 150 Wn.2d at 787 n.8.

Navarro said, "[T]he next time I come around, I want to buy a pound." RP (Nov. 17, 2003) at 101. According to Navarro, Sanchez replied that Martinez was "willing to do more business." RP (Nov. 17, 2003) at 101. Finally, as the State notes in its brief, "The only kind of business Saul (Martinez) was doing with Navarro was the sale of methamphetamine." Br. of Resp't at 12.

Based on this evidence, a rational trier of fact could have found beyond a reasonable doubt that Sanchez knew he was delivering methamphetamine. There was no error.

III. Overt Act & Accomplice Liability

Sanchez argues that the trial court did not instruct the jury that accomplice liability requires an overt act. Because the instructions allegedly allowed him to be convicted as an accomplice in the absence of an overt act, Sanchez contends that his convictions must be reversed and the case remanded. He is incorrect.

Sanchez relies on *State v. Trout*, 125 Wn. App. 403, 427, 105 P.3d 69 (Schultheis, J., dissenting), *review denied*, 155 Wn.2d 1005 (2005), and *State v. Peasley*, 80 Wash. 99, 100, 141 P. 316 (1914), as authority for the proposition that an overt act requires "the doing or saying of something that either directly or indirectly contributes to the criminal act; some form of demonstration that expresses affirmative action, and not mere approval or acquiescence, which is all that is implied in assent." *Trout*, 125 Wn. App. at 427 (quoting *Peasley*, 80 Wash. at 100).

But Sanchez ignores the majority's opinion in *Trout*:

> A person is guilty as an accomplice if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). To convict as either an accomplice or a principal, the jury need be convinced only that the crime was committed and that the defendant participated in it. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). It is the intent to facilitate another in

> the commission of the crime by providing assistance through presence and actions that makes an accomplice criminally liable. *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303 (1992) [*review denied*, 119 Wn.2d 1003 (1992)]. The State must show that the defendant aided in the planning or commission of the crime and had knowledge of the crime. *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003).

Trout, 125 Wn. App. at 410.

Here, Sanchez did more than simply "approve[] of the crimes." Br. of Appellant at 14. As the State correctly notes, Sanchez aided Navarro in his illegal purchases of methamphetamine by introducing him to Martinez. And Sanchez facilitated Navarro and Martinez in the commission of the crimes by arranging the drug deals through his presence and actions. As previously discussed, the State showed that Sanchez aided in the planning or commission of the crime and had knowledge of the crime.[8]

IV. Suppression of Evidence

Sanchez argues that the trial court erred in concluding that his consent to search his business was valid. Thus, he argues that the trial court erred in not suppressing evidence that he: (1) illegally possessed a firearm at his business; and (2) had a prior Arizona conviction for possession of marijuana for sale. We disagree with Sanchez.

On appeal of a suppression ruling, we review a trial court's conclusions of law de novo,

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[8] While jury instruction 5 did not include the word "overt," it did describe the word "aid" in overt terms:

> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP at 147.

and apply the substantial evidence standard to findings of fact. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). While Sanchez assigns error to the suppression ruling, he has not specifically assigned error to either the findings of fact or conclusions of law. Finally, Sanchez has not included copies of the findings of fact and conclusions of law from this suppression hearing in the clerk's papers. *See* RAP 10.3(a)(5) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record). Sanchez waived this assignment of error.

V. Dismissal of Charges

Sanchez agrees that the trial court correctly dismissed the charge of second degree unlawful possession of a firearm. But he argues that the trial court erred when it failed to: (1) strike the evidence relating to the charge (including testimony about the firearm and evidence of his prior drug conviction); (2) take sufficient steps to mitigate the evidence; and (3) instruct the jury to disregard the evidence.[9] Thus, Sanchez argues that "there is a risk that the jury used the prior conviction (and the illegal possession of a firearm) as propensity evidence." Br. of Appellant at 19. Sanchez seeks a new trial.

Sanchez supports his argument with merely a citation to *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), and *State v. Young*, 129 Wn. App. 468, 119 P.3d 870 (2005), *review denied*, 157 Wn.2d 1011 (2006). In discussing the substance of a motion for mistrial in *Young*, Division One stated, "When the sole purpose of the evidence is to prove the element of the prior conviction, revealing a defendant's prior offense is prejudicial in

[9] Nevertheless, the trial court ensured that the evidence did not go to the jury.

that it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged. This risk is especially great when the prior offense is similar to the current charged offense." *Young*, 129 Wn. App. at 475 (footnote omitted).[10] Here, the disclosure of Sanchez's prior conviction for possession of marijuana for sale *could be* unfairly prejudicial. After all, like Sanchez's prior conviction, three of the current charges were for delivery of a controlled substance.

The trial court and Sanchez's counsel discussed in detail the methods for admitting the evidence of Sanchez's prior conviction. Ultimately, the trial court admitted two exhibits: the plea agreement and the judgment and sentence. And both the State and Sanchez stipulated to certain facts necessary to prove the prior conviction, on which the charge of second degree unlawful possession of a firearm was based. Thus, Sanchez agreed: (1) that he was the named individual in the plea agreement and the judgment and sentence; and (2) that the crime of possession of marijuana for sale was a felony.

The general rule is that "[i]t is the duty of counsel to call to the court's attention, either during the trial or in a motion for new trial, any error upon which appellate review may be predicated, in order to afford the court an opportunity to correct it." *City of Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960). Furthermore, when the alleged error is such that its prejudicial effect may not be corrected by an appropriate jury instruction, the proper remedy is to call the matter to the trial court's attention and claim a mistrial. *State v. Beard*, 74 Wn.2d 335, 339-40, 444 P.2d 651 (1968).

[10] Although Sanchez cites to *Young*, his counsel did not move for a mistrial.

Here, Sanchez's counsel did not ask the trial court either to strike the evidence from the record or to instruct the jury to disregard the evidence. And when the trial court offered to give a limiting instruction after dismissing the second degree unlawful possession of a firearm charge, Sanchez's counsel declined its offer. During post-trial motions, Sanchez's counsel explained why he declined the offer:

> Was there really a choice about instructing the jury to ignore the firearm? Was that a real choice? As you know the standard trial lawyer mantra in this is basically you don't ask for an instruction telling a jury to ignore something. That tends to focus more attention on it.

RP (Feb. 10, 2004) at 116. This statement shows that Sanchez's counsel did not accept the offer for tactical reasons.

We agree with our Supreme Court: "'If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.'" *Beard*, 74 Wn.2d at 340 (quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)). On appeal, Sanchez may not second-guess his defense counsel's tactical decision by an after-the-fact objection. *State v. Rodriguez*, 146 Wn.2d 260, 271-72, 45 P.3d 541 (2002). The trial court did not commit error when Sanchez's counsel declined its offer to give a limiting instruction.

VI. Impeachment of a Witness

Sanchez argues that the trial court erred in allowing the State to impeach witness Cresencio Bucio with his prior conviction for possession of cocaine without balancing its probative value against its prejudicial effect.

Evidence of prior convictions may be admissible for the purpose of attacking the credibility of a witness under ER 609. *State v. Rivers*, 129 Wn.2d 697, 704, 921 P.2d 495 (1996). We review rulings made under ER 609 under an abuse of discretion standard. *State v. King*, 75 Wn. App. 899, 910 n.5, 878 P.2d 466 (1994), *review denied*, 125 Wn.2d 1021 (1995).

ER 609(a) states:

> For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

On appeal, Sanchez thoroughly argues that the issue before us is whether the trial court abused its discretion in admitting evidence of Bucio's prior conviction for impeachment purposes under ER 609(a). But at trial, neither party made a motion in limine or requested a ruling from the trial court regarding the admissibility of this evidence.[11] In other words, neither party asked the trial court to invoke its discretion.

Instead, Sanchez's counsel raised the subject of Bucio's prior convictions during direct examination. Through a series of questions, Sanchez's counsel elicited evidence that Bucio had been: (1) "in trouble with the police before"; (2) arrested for theft almost 10 years ago; and (3) arrested for possession of cocaine in 1999. RP (Nov. 21, 2003) at 74. Finally, Bucio admitted

[11] The trial court did state, "You can use the theft third and you can use the felony VUCSA." But it explained to the State, "You have to follow the case law and rules as to how you do it." RP (Nov. 21, 2003) at 13. The State never attempted to introduce the evidence and the trial court made no further ruling on its admissibility.

that he did not know whether the conviction for possession of cocaine in 1999 was a misdemeanor or a felony. RP (Nov. 21, 2003) at 75.

On cross-examination, the State briefly inquired into these convictions. The State asked Bucio why a felony conviction "wouldn't stick in [his] mind," and why he never mentioned "any kind of theft." RP (Nov. 21, 2003) at 76. Bucio replied, "I didn't know you were going to search all that out." RP (Nov. 21, 2003) at 76.

Because Sanchez raised the subject of Bucio's prior convictions during direct examination, the State was entitled to inquire into the nature of the offenses, regardless of whether the convictions would have been admissible under ER 609(a). *State v. Renfro*, 96 Wn.2d 902, 908, 639 P.2d 737, *cert. denied*, 459 U.S. 842 (1982); *State v. Hultenschmidt*, 87 Wn.2d 212, 550 P.2d 1155 (1976). As our Supreme Court stated with approval, *Hultenschmidt* "stands for the still valid proposition that once a subject has been raised during direct examination further inquiry is proper on cross-examination." *Renfro*, 96 Wn.2d at 909.

Because the trial court did not rule on the admissibility of Bucio's prior convictions and because Sanchez raised the subject of Bucio's prior convictions during direct examination, no error occurred.

VII. Ineffective Assistance of Counsel

Sanchez argues that his counsel was ineffective when: (1) he failed to object to Mrs. Sanchez's hearsay statements; and (2) he failed to move to strike evidence and to request a limiting instruction. We disagree.

Effective assistance of counsel is guaranteed under the federal and state constitutions. *See*

U.S. Const. amend. VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) that deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005) (citing *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996)); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). But if counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Day*, 51 Wn. App. 544, 553, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We give great judicial deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

First, contrary to Sanchez's argument, his counsel did object to the admission of Mrs. Sanchez's hearsay statements. When the State sought to introduce Mrs. Sanchez's statements under the co-conspirator exception of ER 801(d)(2)(v), Sanchez's counsel objected, stating:

> Your Honor, knowledge after the fact is not legally sufficient for conspiracy. She's not a conspirator. Everything [the State] argues assumes facts that aren't in evidence. He assumes that even if we take the evidence at face value, he assumes that after Alicia Sanchez got this information she told Mr. Sanchez and Mr. Sanchez called Mr. Martinez. But there is no evidence of that. It is an assumption.

2 RP (Nov. 18, 2003) at 20. The trial court responded:

> But the [S]tate has in evidence the fact that Mr. Navarro, by his own testimony, called and talked to Alicia Sanchez. And as a direct result of his conversation with Alicia Sanchez, which he asked her to pass on to Mr. Sanchez - - and I'll grant you, there's nothing in the record at this point as to whether he did or did not, but in response to that, he was contacted directly by Mr. Martinez. The [S]tate's entitled, seems to me, not only to argue the evidence, but also the inference from the evidence, and the inference is that there was in fact some communication that went from Ms. Sanchez either to Mr. Sanchez or to Mr. Martinez directly, one or the other. Again, the issue before the court is the question of admissibility based on relevance.

2 RP at 24. Sanchez's counsel then stated, "Okay. I understand your ruling. Thank you for making a record, your Honor." 2 RP at 24.

Second, contrary to Sanchez's argument, his counsel did have a strategic reason for not moving to strike evidence and not requesting a limiting instruction. We reiterate what his counsel noted in post-trial motions:

> Was there really a choice about instructing the jury to ignore the firearm? Was that a real choice? As you know the standard trial lawyer mantra in this is basically you don't ask for an instruction telling a jury to ignore something. That tends to focus more attention on it.

RP (Feb. 10, 2004) at 116.

Third, we hold that Sanchez was not prejudiced by his counsel's actions. Even though his counsel did not move to strike and/or request a limiting instruction regarding the evidence of his prior conviction, this evidence never went to the jury. And the State never referred to either the dismissed charge or the evidence of Sanchez's prior conviction in any fashion during its closing argument.

Thus, we hold that Sanchez's counsel was not ineffective; i.e., his conduct was part of a legitimate trial strategy that did not prejudice Sanchez.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.